

1893

Judicial Legislation

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T H E S I S.

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J U D I C I A L L E G I S L A T I O N.

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Submitted for the Degree of Bachelor of Laws

----- by -----

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1893.

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I

IS THERE SUCH A THING AS JUDICIAL LEGISLATION?

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Is there such a thing as judge made law ? Were this question to be discussed from the theoretical standpoint alone, a negative answer would be the only one admissible. That there should be no such thing was affirmed by many of the greatest of England's judges long before America had been thought of; and since its discovery, that same view has been held to more or less strenuously by the conservative members of the judiciary both in England and America.

The courts in referring to the question of judicial legislation use such expressions as; "We believe that the certainty, the stability and the symmetry of any system of jurisprudence should be preserved," "we believe in a rigid adherence to the doctrine of stare decisis." Lord Mansfield says ; "it is not my duty to make the law, but by my industry I can find out what

the law has been in the past and thus declare it for the future."

The rule has been to adhere to precedent and to leave it to the legislature to lay down new lines to be followed as necessity requires. However true to theory this proposition may be, it is certainly far from what actually exists. In their anxiety however, to refrain from eating the forbidden fruit, which theoretically is fit food for the legislature alone but which in the nature of things they must partake of in generous quantities, the judges in their dire extremity, have resorted to legal fiction, in order to keep up a show of consistency. They declare that a court has a right to judge as to whether a question has been formerly considered and determined with due deliberation; also, that "due deliberation is the test as to whether it is good or bad law, and if bad law, it is, they say, ^{*}no law at all." It will be seen that by the aid of the above propositions, any objectional decision may be over-ruled by any court if it appears to its judges to be bad law and therefore not settled with due deliberation, and consequently, no law at

^{*}Butler vs. Van Wyck 1 Hill 438.

all. With the bitter pill thus sugared over with legal sophistry, it is, whenever circumstances require, swallowed with due judicial dignity. In *Peo. vs. Brooklyn* 9 Barb. 544 overruling *Wright vs. Wright* the court said:- "We look into these opinions in vain for the evidence of that solemn argument, and mature deliberation which upon the doctrine of stare decisis should give this case the weight of authority sufficient to foreclose the judgment of all other tribunals upon the same question." While the doctrine overruled in that case was one backed up by a long line of cases. Again, in *Bentley vs. Goodwin* 38 Barb. 640, the same court used the following language in regard to a decision overruled by that case. "If the decision was clearly erroneous so as to leave no doubt as to the error, or the result of mistake, the doctrine (stare decisis) need not be adhered to, for the decision was probably a departure from the spirit of the doctrine in the first instance, and therefore it is not violated by declaring the true position in a later case" i.e. bad law is no law.

As a result of this painfully hairsplitting reas-

oning many of our judges both formerly and at present have hoodwinked themselves into believing, that all decisions handed down by them have had this legal anomaly, "judicial legislation." effectually strained out, by forcing them through the filtering apparatus of the above mentioned propositions. Likewise, that great body of law, that has been growing up into a beautiful and symmetrical structure for so many years about the Court of Equity in England and America, representing in **c**ystalized form the righteousness, pure and simple, of its many judges, has been, as some think, purified of the heresy by a similar chain of fictional reasoning. Mr. Wooddeson asserts*, that "Equity is a judicial interpretation of laws, which presupposing the legislator to have intended what is just and right, pursues and effectuates that intention."

This explanation of the origin of Equity reminds one forcibly of the Biblical legend of Adam and Eve in the garden of Eden as explaining the origin of the human race. The mere reading over of this legend has dispell-

* I Wooddeson Lect. VII p.192.

ed effectually the disagreeable image of a monkey ancestor from the minds of millions of the credulous, and substituted therefor, the more pleasant spectacle of a perfect man whose degenerate off-spring we are supposed to be. If this latter conclusion has been a fountain from which many have drunk self-respect and contentment, well and good. May it still continue to sparkle though it be unscientific. And if the above explanation of the origin of Equity has in the past eased the conscience or rendered the load of responsibility lighter for our Chancery tribunals, I should be the last one to aid in taking it away.

But there is another phase of the question to be presented which has not to do with pedantic fictions, but which presents things as they are, and which can leave no doubt as to the existence of judge made law. The fact that many great judges have overruled on further reflection decisions by themselves made, is in itself adequate proof of its existence. Whether this has been done openly or whether it is sought to hide the fact behind carefully thought-out legal fictions, it makes no

difference as to the real result. The result is accomplished . Judicial legislation has existed in the past to a larger degree than any other. Like the poor it will always be with us and the greater a judge is the more frequently will he exercise that function. History will bear us out in this assertion. Lord Mansfield, conservative as he was, has at least on twenty occasions changed an opinion positively given. This might have been done under the theory that "bad law is no law" and therefore, the doctrine of stare decisis was not violated in returning to the true principle, but nevertheless, it was done, and brushing away the cobwebs of sophistry, we behold here twenty distinct cases of judicial legislation and many more might be attributed to him. We find many instances where Lord Hardwicke has done likewise, and the same is true of many other illustrious characters. Indeed the greatest abilities are generally accompanied with the greatest candor and a desire uninfluenced by any former conviction or prejudice, to do the right and the equitable when circumstances by any possibility, permit it. There are instances it is true

especially in the law relating to real property, where the rule of stare decisis should be strictly applied to all cases therein arising; but this in no way effects that which should be done as a general rule when the special case is not up for decision. Sir Edward Coke, though a great judge was a great legislator also and in making adjudications he professed an earnest belief in the following maxim*, "Deus optimus maximus sitientis jus et justitiam (ut credere cogor) intelligentiam aperit simil et extendit" (Almighty God openeth and enlargeth the understanding of the desirous of justice and right). If judicial legislation does not exist, what has become of that regular and single system of the common law which our English forefathers brought with them to the shores of this continent? Originally there was one system, now the common law as declared in one state, conflicts to a greater or less extent with that of every other state. I think it will be admitted without further illustration, that judicial legislation does in fact exist.

* 9 Rep. (p. XXXVIII Lond. 1826)

II

JUDICIAL LEGISLATION IN ITS RELATION TO

STATUTE AND THE COMMON LAW .

My next point is, that judicial legislation has been more wide reaching in its results than that originating in the legislature proper. This may seem at first, a sweeping and radical statement, but when one thinks of the relative positions occupied by the legislature and judiciary respectively with reference to society, as composed of individuals, the position taken, it is submitted, is not an absurd one after all. The legislature in the main, has to do with people as a unit. From the highest legislative body in the land down to the town board of supervisors this is true, and this statement will hold true not only for America but for England, France and Germany and any other countries where the people in any sense govern and local self-government prevails. Legislative enactments cannot

deal intimately with the individual so as to settle the millions of difficulties and inequalities constantly arising between man and man in practical life. The legislature may construct the outline, the rude framework of a system of laws, but it never can furnish the multitudinous array of further material, necessary to convert that rude frame into a symmetrical and habitable abode for civilized society. The judiciary alone can furnish that material. Even the very foundation upon which the legislature builds its part of the structure has been provided it by equitable and legal principles originating primarily with the courts. So without hesitation I assert, that judicial legislation furnishes now and always will the principal element in our system of law. Codification has never changed the character of law. The mere fact that great compilations of the existing law have been thrown together into code form and passed by the legislature as statutes, does not in any sense, make such law a product of the legislature. It still remains a product of the judiciary and the legislature by adopting it as its own, has given it noth-

ing,neither has it taken anything away.

We read a great deal in theoretical text-books on Politics and Government about that Trinity which exists in all free governments,the Executive the Legislative and the Judiciary,as to how these departments should be entirely distinct and each adhere strictly to its own duties and limits. But in practice it must always be otherwise. These duties are so internally connected, so closely interwoven,so act and re-act upon each other, that it is often difficult,sometimes impossible to decide where the jurisdiction of one department ends and that of another begins. This is peculiarly true when we approach to that broad common field lying between the legislative and judicial departments. And this common field is constantly growing broader and therefore draws the line of demarcation between them less and less distinctly as time goes on. Perhaps the judiciary is creating less and less of the rough frame work,the rude skeleton of our system of laws,but at the same time, it must,as it has ever before,furnish the living tissue and vitality which alone renders the system adequate and effective in meeting the enormous demands made upon it

by our highly developed social, political and industrial civilization.

For example, the law of corporations is composed, governed and founded upon statute as much or more than any other one branch of the law; yet if those parts entering into it, and which were contributed by judicial legislation, were to be entirely eliminated from it, what would remain? Obviously enough, simply dry bones and a small heap at that. How much would be left of the statutory part of corporation law were we to prune away all such principles as the common law doctrine in this country, that the capital stock of a corporation is a trust fund for the benefit of creditors; or that transfers of property by a corporation in fraud of its creditors will be set aside and the property or its value be recovered from the transferee; or in fact, all those principles common to the common-law institution known as the joint-stock association and the corporation? About the only feature that distinguishes the corporation from the joint-stock association is the statutory provision for limited liability, while all of the fundamental principles were given it by that great child of

judicial legislation known as the common law, and out of them disregarding the statutory element, we could easily construct a machine which could be depended upon to perform almost precisely the same functions as those performed by the corporation itself.

As regards Acts passed by the legislature, judicial legislation comes in to modify and to re-enforce principally in four ways: (1) by applying to them the rules of statutory construction. Much law is created in this way. For instance in one case a statute may be pruned down and in other cases practically construed out of existence by construction. A good example of which, is the manner in which the old Statute of Uses was smothered by the common law judges and by equity tribunals; or (2) the judiciary may decide that a certain statute is unconstitutional or is not unconstitutional as the case may be, and thus, either destroy it altogether, or in order to save it, may greatly modify its effect and in a large

measure athwart the interest of the legislature: (3) or in construing any statute, the judges may impute a narrow meaning to certain words used or a liberal meaning as the case may be, and thus modify and mould the law to their own notions of justice and the public good. To illustrate this point take the Statute of Charitable Uses passed during the reign of Elizabeth. This statute contains a provision mentioning "the repair of churches" By reason of this simple phrase existing in the statute the courts have decreed, that everything devised, for a religious purpose, is within the provisions of the statute.

(4) A statute may be ignored altogether in some important particulars and new law created by the judiciary, for instance the case of Botsford vs. Krake 1 Abbotts Pr. (N.S.) 112, coming up under the statute regulating wills in New York State. This case gives us an excellent example of where judicial legislation came in to override a statute in order that justice **might** be done. It is a fundamental rule of the law of wills that statutes concerning them shall be construed strictly and that the instrument itself left by deceased persons shall be construed liberally. In this way alone are

the courts able to get at the intent of the testator and to successfully carry out such intent as to the disposal of property left by him. In the Botsford vs. Krake^{*} Will case, we have an example of judicial legislation cutting both ways like a two-edged sword, entirely overriding a statute on the one hand and making a new addition to the law of wills as to the State of New York on the other.

The facts in the case were substantially as follows:

The deceased, a volunteer from the State of New York in the actual service of the United States was wounded in the battle of the Weldon R.R. in Virginia August 18, 1864 and died the same night. Previous to his death, in a letter written to his sister, Jane Botsford, he expressed a desire and intention that in case of his death his property should go to his sister the said Jane Botsford.

On the eve of his death it appears that the deceased discussed with his attendants the subject of the disposition of his property, but they refuse to swear that he expressed a desire that his sister Jane should have it.

The judge deciding this case seems to decide it on principles of abstract justice without regard to the statute

* *Botsford vs. Krake 1 Abbott's Pr. (N.S.) 112.*

existing regulating the subject of wills. The whole decision is summed up in the last sentence where he says; "that portion of the letter referring to his property must be admitted to probate as a will." Here he drops the whole case without further comment and makes no attempt to fortify this position taken, by legal argument. The New York Statute declares that "Every last will and testament of real or personal property or both, shall be executed and attested in the following manner." Then follows the well known provisions regarding attesting witnesses, the testator's signature, acknowledgment &c. One exception and but one is made to this rule. Section 22 Ch. VI Art. 2 N.Y.R.S. says; "No nuncupative or unwritten will, bequeathing personal estate, shall be valid, unless made by a soldier while in actual military service or by a marine while at sea." By the statutes of this state it will be seen, that no written will is recognized as good unless the requirements of the statute are complied with; therefore, it follows that the letter in this case is to be ruled out; and no nuncupative will appears in the case, for the plaintiff completely failed

to prove the existence of such a will, as the attendants were unwilling to swear that such a will was made by the dying soldier. The letter itself, nevertheless, was declared to be a will and the statute entirely ignored.

Turning from statutory law as a field for judicial legislation, it will be well to glance at some leading cases where the judges have wrought marked changes in the old and time honored rules of the common law itself. In other words, where they have changed or destroyed the force of prior precedents by themselves made by making alterations and new additions to the common law irrespective of former decisions. I will take two recent and sharply defined cases to illustrate my point. (a) The recent case of judicial legislation originating in the courts of the State of Wisconsin, which does away as to that state, with a part of the force of the maxim, "omnis rati habitio et mandato priori requiporatur," in the law of Agency. (b) The case of Seymour vs. Sturgis 26 N.Y. 134, which practically does away in New York, in many situations, with the rule that "the capital stock of a corporation is a trust fund for the benefit of creditors"

(1) The rule in the law of Agency, that the subsequent

ratification by a principal of his agent's unauthorized act, is equivalent to a prior authorization, had never been departed from in any jurisdiction, in a material way, until it became the subject of judicial scrutiny in the case of Dodge vs. Hopkins 14 Wis. 630. This case holds that this rule applies only to the liability of the principal as to the other party, that this liability is not mutual until some act has been done by the other party which expressly or impliedly gives assent to the principal's ratification. Under the rule, thus modified, we have the following situation. In the first place, the unauthorized agent so far as his principal is concerned, is entirely eliminated from the transaction by the subsequent ratification, and the liability as to the other party immediately attaches to the principal ratifying. It seems to me that by ratifying the unauthorized act of the agent, the principal, by this modified doctrine, simply renews the offer or acceptance made in the first instance by the agent unauthorized. This doctrine says, that if there was no enforceable liability against the other party before, there certainly is'nt after ratifica-

tion, for the other party took no part whatever in the ratification. That was simply a transaction between the unauthorized agent and his principal. Therefore, the other party at the time of the ratification, is for the first time in the history of the transaction placed in a position to make or accept an offer coming from the other side, which would be binding upon him. In other words, the ratification by the principal, is equivalent to that part of the transaction which would have come from him in the first instance, had he originally proceeded in the place of the agent. It is obvious therefore, that the other party could not be bound until he had made the transaction complete by doing his part. This he may do, by making any move which might be looked upon as affirming what he had already done when dealing with the unauthorized agent, as expressly affirming the ratification, or by beginning an action against the principal to enforce the contract after ratification. But in no case could the principal proceed against the other party until after he had in some way affirmed or assented to such ratification.

Mr. Mechem in his work on Agency sec. 179, is the first text-book writer who takes notice of this interesting, new and important bit of judicial legislation. He there gives it careful attention, and after an elaborate argument, adopts it as sound law, citing principally Dodge vs. Hopkins, supra, Altee vs. Bartholomew 69 Wis. 43 and Townsend vs. Corning 23 Wend. (N.Y.) 435, to support the proposition. However, it is very doubtful as to whether the New York case can be cited as an authority. True, certain favorable inferences may be drawn from it as to the doctrine under discussion, but nothing directly in point, and it is to be doubted whether the distinguished judge writing the opinion in the New York case ever had such a doctrine in mind. Certainly nothing to indicate such a fact appears in any of the later decisions. There can be no doubt however, as to the state of the law in Wisconsin. The two Wisconsin cases above cited, are decisive as to that. It will be noted, that the judges in the Wisconsin cases and Mr. Mechem in his text-book, give as the reason why the other party is not bound by the principal's ratification, that such other party has not affirmed or assented to the ratification; in other

words, that no assent has been given to the principal's placing himself in the shoes of the unauthorized agent. But it seems to me as my reasoning on this point will show, *supra*, that the true reason is to be found in the fact, that the ratification of the principal is nothing more or less than a renewal of the offer or acceptance as the case may be, made in the first instance, by the agent, and which before the ratification was invalid as to the other party, provided he wished to treat it so. If this be true, in order to make the contract a binding one, the other party must accept the offer thus renewed, or if he is the party making the offer, it is for him to withdraw such offer, before the principal ratifies his agent's unauthorized acceptance, otherwise he is bound. Either course of reasoning brings about the same result, but I submit, that the above is the more logical.

(2) The other case illustrating how judges legislate by overruling modifying or creating new precedents, is the case of *Seymour vs. Sturgis* 26 N.Y. 97. In this case, it was held that the liability of a stockholder to a corporation, does not arise out of his relation to the

corporation, but depends upon his contract express or implied, or upon some statute. As between the stockholders and the corporation, this is no doubt, a correct exposition of what the law is and should be, but the law as laid down in this case goes a step further, and decrees, that a creditor of the corporation holds no different relation to the shareholder than that held by the corporation itself. That a creditor of the corporation suing such stockholder, who holds shares for which he has paid nothing, in order to enforce payment from the shareholder of the face value of the shares so held, must show that the corporation itself could enforce such payment. This decision, in cases of gratuitous holders of stock in a corporation, entirely abrogates in the State of New York, the well settled proposition, that "the capital stock of a corporation is a trust fund for the benefit of creditors." As the law now stands in this state, a corporation is at liberty to distribute its stock gratuitously, in whatever quantities and to whomsoever it pleases, regardless of the rights of creditors; and such shares are no part of the common trust fund.

Substantially the same question came up again in the case of Christenson vs. Eno 106 N.Y. 97 where the following proposition was laid down. "At common law, one to whom shares have been transferred gratuitously by a corporation, does not by accepting them become a debtor to the company or make himself liable to pay the nominal face of the shares and an action is not maintainable against him by a creditor of the company to compel him to pay for such shares." Thus the Seymour vs. Sturgis decision was affirmed.

Here the opportunity was offered to the judges of our Court of Appeals to strangle the heresy introduced by the Seymour v. Sturgis case into our law, but they lacked courage. Another decision was added by them to its support, and they broke with all principles of public policy and equity for the sake of being consistent.

III

THE FIELD OCCUPIED BY THE JUDICIARY

IN LEGISLATION.

A. Rules to be followed by the judiciary in the course of its legislation.

(a) "It may be fairly and legitimately claimed," says one writer on this subject, "that where changing the rules of common law, as established by decided cases, new rules of property would be introduced and vested rights disturbed, the policy of the law would be against such change." It would seem that this rule should never be departed from by our courts, it being the distinctive office of the legislature to make changes of this sort effecting probably the people of a whole country or state.

Again, the legislature alone can make such change in such a manner as would incur no disturbance of vested interests. This usually is brought about by inserting into the enactment making such change, a proviso that the law thus altered should not affect rights already vested.

This the courts would be unable to do.

(b) Another rule is, that judges grappling with questions as to which they are in doubt concerning the correct rule to apply, should by no means be above yielding to the influence of solemn decisions of well considered cases; and that such doubtful questions should find a solution in the consultation of precedents. The wise and conservative spirit of the law demands this. ^{However,} but little more than is contained in the above rules can be said in behalf of the sacredness of precedents.

Judge Comstock in the case of Church vs. Brown 21 N.Y. 335, in which case he expressly overrules Brewster vs. Silence 4 Seld. 207, and Draper vs. Snow 20 N.Y. 331, declares that the following doctrine should commend itself to both bench and bar; "When the rules laid down by the courts become the laws which sustain titles and contracts, they are in general to be sacredly adhered to: but when they are used only as instruments of destruction error ceases to be sacred and principles of truth ought to be re-asserted."

Barring those fundamental principles of abstract

justice upon which our law is founded, and which will ever be revered and obeyed by man, so long as he possesses that power to distinguish between the just and that which is unjust, with which the Almighty has endowed him, and the restraining rules above noted, the doctrine of stare decisis should have no place as a restraining element in the development of the common law. Aside from the considerations above mentioned, it would seem that the judiciary should be left free to act in its own conservative way along legislative lines, and that too without censure.

The legislature is too slow too crude and inexperienced with the actual workings of society ever to be able to originate law in the form of statutes that apply adequately to the individual as his needs may arise. Its time is too much taken up with numerous other engagements to constantly revise the laws and enact new measures for the protection of life, the security of property, the preservation of private rights, and the redress of private wrongs. As I have intimated before the principal function of the legislature is to

enact general laws applicable to the whole community; and it cannot except in an imperfect way reach the needs of the individual in his dealings with his neighbor.

Those dealings are constantly going on, the legislature meets but twice each year, and while it is in session, the general needs of the state places a heavy tax on its time and attention. But the courts being in direct touch with both parties of the transaction and being able through its processes to reach both alike, not only can feel and know the grievances of each but can reach out with its strong arm and administer the remedy.

And this remedy generally speaking is administered on the spot, while the matter is fresh in the minds of all parties. Were this not the case, organized society would be impossible; for it is, after all, the harmonious relations which exist between men in their every-day life, that makes a well ordered society possible. Order and justice must go hand in hand or civilization is not.

The judiciary must, therefore, create the law to meet the peculiar situations constantly arising in the intercourse between individuals and which cannot be provided for by

the legislature. It is in this way that a large proportion of our law has been made up, that portion in particular, that is most intimately connected with the rights of life, liberty and the pursuit of happiness. With civilization progressing as it is, and as I believe it always must, with unheard of and unthought of situations constantly arising in every department of human endeavor, the conclusion comes irresistably home, that judge made law must ever keep pace with progress, so long as the elements of order and justice remain at the foundation of society, which is forever.

IV

THE NATURE OF JUDGE MADE LAW AND ITS
DEVELOPMENT.

The inquiry into the nature of judicial legislation should first be prefaced by a definition as to how judge made law is originated. Generally speaking it consists of the rules drawn by the judges from the customs and usages of the people, which are crystalized by them into substantive law in the form of decisions. The decision then is the real and definite expression of the courts' legislative function, and is an outgrowth of administering justice itself, of applying the principles which reason and policy demand to ever-varying circumstances. The decision may be defined as the result of two somewhat different chains of analogies approaching a common point by lines more or less inclined to be parallel. This method of approach is by a contest at the bar; that contest is carried on by the urging of these different

analogies; and as is well said by Paley,* it is in the comparison, adjustment and reconciliation of them with one another, in the discerning of such distinctions, and in the forming of such determinations as may either save the various rules set up in the cause, or if that be impossible, may give up the weaker analogy to the stronger, that the sagacity of the court is exercised in rendering the decision." And when we have defined the decision we have also defined the machinery of judicial legislation, and we also have at least an insight into the nature of judge made law. We may now turn to a discussion of the development of some of the elements that compose it.

All law is founded on customs and usages. Such sweeping statements as "the common law is judge made law" "the common law originated in the courts" are therefore misleading and fail to tell the whole story. As a matter of fact law and order in a primitive though adequate form, existed among our savage and barbarous ancestors long before the outlines of a judiciary had

* Moral Philosophy Vol II p.259.

been developed. This governing law was then, synonymous with public opinion and custom. It is a great mistake to suppose that because away back before the dawn of our civilization, our ancestors lived and died without a system of police and judicial machinery to maintain order and administer justice, that they lived unrestrained at their own free will. Then as now, the individual was selfish and too apt to look to his own personal interests and those of his near friends, and to disregard or wilfully to prejudice the good of his neighbor and in consequence that of the whole community. But public opinion, as a rule, the expression of that which constitutes the public good, of the interests of the all over the one, enabled the assembled tribe in those early times, to crush the mean and cowardly with their scorn and to give the reward of glory to the generous and broad spirited who exerted themselves for the good of the all. This pressure of public opinion caused men to act according to custom, which then was the law of the land and which gave the rules as to what was to be done and what was not to be done, in most affairs of

life. And thus it was that custom law grew up and became in no small sense the store-house from which the judges constructed our common law. This result followed very naturally, for practically in every instance, customs came into existence for the benefit of society - or what was considered so, and in that way formed an enduring basis upon which to build the complicated system of laws characterizing our present civilization. In no small sense is custom also the basis of statute law, although considerations of present expediency, without regard to what existed in the past, come in here to dictate to a much larger extent. Public opinion as expressed in custom and usage laid the foundation for the development of the common law and judicial legislation developed it; and that along two distinct lines - civil and criminal. The development of the civil and criminal law may best be illustrated by taking these great departments up in their respective order and treating by way of illustration. Two representative examples will be used for this purpose.

(a) The one used to illustrate the course of development of civil law will be the doctrine of ultra vires as applied to corporations. Here judicial legislation plays a most important function in making the existence of the corporation possible, by aiding in the development of an organization that the public would tolerate.

(b) Punishment in its severe and modified forms as a characteristic in the history of crime will give us an illustration as to the part judicial legislation took in the development of the criminal law.

(1) The corporation as a creature of statute, is comparatively of recent origin. But away back in the history of the English people we find the common law corporation constructed on common law principles and existing mainly for municipal and religious purposes. But as the industrial situation took on a more intense aspect and the great commercial enterprises sprang into greater prominence the proper soil was furnished in which to extend the corporation to other and more general purposes. At first, they were practically unhampered by statutory restriction; but it soon became apparent as they increased in numbers, wealth and importance, that

something must be done in the interests of the public to confine their powers within narrower limits. This result was brought about in part by statutory enactment, in part by judicial legislation. By mutually complementing each other, these two factors have brought down to us from the shadowy past, the corporation in its present perfect form. At the beginning of the period of restriction, statutes were enacted in the form of general laws prohibiting corporations from exercising certain enumerated powers. This was the first method of restraint. But industry and commerce continued to expand, and rich and powerful corporations on account of their utility in carrying on the gigantic manufacturing and commercial enterprises that in the course of time sprang up, kept pace with them. The corporation thus became such a common and such a powerful factor in the industrial world and the necessity to restrain became so frequent and arose in such unexpected and diverse ways, that the statutory system of restraint, first resorted to, wholly broke down and another method had to be worked out. Let us be sure and understand the situation at this point. Let it be understood that in this

first period, corporations came into being under the common law and were restrained by statute. This method of restraint, as we have seen, proved a failure. By the new method adopted, when this failure became apparent, corporations were brought into existence as we have them today, wholly by statute, their power being limited and prescribed by their charters or general incorporating acts. Acts contrary to the restricting statute, while corporations were under the common law theory, were mala prohibita, but acts by corporations, as statutory creations unauthorized by the creating charter or statute, were called ultra vires. The creating statute, whether it be a charter or a general law, is simply an enabling act and comprises the sole source of their power. Marshall C.J. in referring to such creating statute in *Head vs. Ins. Co.* 2 Cranch 127 says "It enables them to contract and when it prescribes to them a mode of contracting they must observe that mode, or the instrument no more creates a contract than if the body had never been incorporated."

As a consequence of this change of base that the corporation has undergone, has arisen as a product of judicial legislation, the doctrine of ultra vires.

That doctrine is, that whatever is unauthorized by the real intent and spirit of the law creating the corporation, the courts hold to be impliedly prohibited by the rule of statutory construction.

The doctrine of ultra vires, above outlined, furnishes us one of the best examples of judicial legislation. It was introduced into the law of corporations as we have seen upon the strong grounds of public policy and business necessity and to meet and provide for circumstances constantly arising which called for the intervention of some strong hand, but for which the legislature had not and could not in the nature of the case provide. This great doctrine is one of the many examples which might be taken from civil law going to show that judicial legislation is not only a beneficent thing but that it fills a place and performs a function that the legislature could not hope to cope with, and that, because it is never on the spot as are the courts when the thing transpires, to jot down all the circumstances and then apply the remedy. A large part of our law is, and must be, a natural product coming from actual ex-

perience gained by actual practice in the courts, by minute examination by the judges into new and undreamed of situations, constantly arising in and growing out of our great and complex organization. No legislature composed of men, educated in large part in the great school of industrial and political competition, are capable or adapted for adjusting equitably our social relations.

As I have intimated in a previous part of this discussion the legislature is undoubtedly capable of dictating general lines of action but it can never be in a position to fill in the details which in fact compose the greater and more important part of the law. The judges before whom the actual cases are tried, who hear all the evidence, who have complete control of the situation and who are so guarded in the interests of the public, that partisan, pecuniary, and personal prejudices are absent to dictate, are the only ones capable of performing this function. The legislator, like a spectator on a high eminence overlooking a valley below him, wherein a great battle is raging, sees only the general lay of the fields lying two or three miles below and wonders why such and such movements are not directed against the enemy's

position. But were he present on the field, engaged in the conflict, he would at once discover a masked battery here, an impassable ravine there, before obscured, and a thousand and one other circumstances to be taken into consideration that he had not and could not ^{have} noticed before. The courts being directly concerned in the conflict must of necessity apply the law, and where new situations arise, ^{or} abuses creep in, by reason of defective statutes, law must be created or changed, by some hook or crook, so as to remedy the case in hand.

This power of the courts to recognize and do away with existing abuses cannot be better illustrated than the way the courts have dealt with corporations on the question of ultra vires. At the outset, ultra vires acts were considered in all cases to be absolutely void, and the courts were confronted with a new situation of grave importance. At first the hard and fast lines of the law refused to give way to the necessities arising therefrom and to adapt themselves to the new condition of affairs. Consequently, corporations revealed for a time in the demoralizing but profitable

field of fraud and trickery. In that transition period, the time honored maxim of the common law, which has always meant salvation to the tricked and consternation for the trickster, namely, "a man cannot stultify himself," was lost sight of and corporations were even allowed to go to the extreme of putting in as a defense their own incapacity, when-ever it became inconvenient for them to live up to their contract. Other fundamental principles of law were brushed aside to that extent, that corporations were allowed to keep the benefits of a contract and yet refuse to perform its part of the agreement. But this condition of affairs could not always exist, for the whole spirit of the law ever seeks out and applies that which is just and equitable; and the result was, that the judges of the courts finally came out of the woods of cowardly consistency where they had long wandered in hopeless bewilderment, into the open day. They had at last found their bearings, had struck a solution of the whole problem, and that result was brought about by judicial legislation. Not a new remedy by any means, but one which in some instances, it has taken

years to apply.

I can best illustrate my point by stating the doctrine as it originally stood, and then showing how the courts met the situation arising therefrom. The question of ultra vires from the nature of the corporation itself, can only arise where an outside party has contracted with the corporation and proceedings are begun to enforce performance, or to recover damages from the party in default. The original proposition governing this class of cases may be stated as follows: All ultra vires contracts being unlawful are void, and the defense of invalidity is available equally to both parties to the contract. This proposition was sustained in the courts on the ground that the other party presumptively had notice of the extent of the powers of the corporation, and therefore, was estopped from claiming a remedy. But Comstock C.J., in *Oneida Bank vs. Ontario Bank* 21 N.Y. 490 - 5, by an admirable and courageous use of the legislative power of the judiciary, renders the above position untenable, by enunciating another new and controlling principle in the law of cor-

porations, which is founded in equity and the public welfare. Therefore, it has come to stay. This new proposition can be best set forth by quoting the learned Judge's own words; " There is no doubt" says the Judge "a principle of the common law, that illegal and prohibited contracts are void without being so expressly declared by any statute. But there is also another principle equally well ascertained and more beneficial in its results, that no party shall set up his own illegality or wrong to the prejudice of an innocent person"

The above, is now the principle controlling in actions growing out of ultra vires acts. Its development, to be sure, is but a single example of how judicial legislation has moulded, slowly at times, but surely, the whole body of our corporation law. I might go on and illustrate in detail how by its aid, the danger to the public arising from the corporate mode of doing business has been reduced to the minimum, and at the same time, has increased its utility as a machine well on toward its maximum limit. Many examples might be given; for the corporation had its origin in the common law and nearly

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every principle which governs it today, has been reared and fashioned through the wise discretion of the courts. However, I have avoided the use of numerous examples, in the belief that my point would be clearer made, by treating this single great example of judicial legislation in the law of corporations, with some degree of completeness; and my aim has been to show by this discussion upon the development of the doctrine of ultra vires, how public opinion as expressed in custom and usage, which is but another way of saying public necessity, finds expression through the clarifying medium of the courts, and in that way becomes a part of the organic law of the land.

(b) We now turn to discuss some of the phases, and the part that judicial legislation has played in the development of the criminal law. The criminal law though following statutory lines of development in the main, yet has been very largely influenced and moulded by judicial legislation. The law of evidence, the mode of trial and to a degree, the punishment meted out to the criminal, have been in a great degree fashioned by its hand. Of course, this influence has extended down through long centuries and to get an understanding of

its real formative results, it will be necessary to inquire somewhat into the origin and development of the criminal law as a whole.

The criminal law even more largely than our civil law is of Germanic origin. This fact is now generally recognized by scholars. "There can be no doubt" says *Pike** in discussing this subject, "that the settlers who crossed the German Ocean and gave the name of England to Southern Britain, brought with them certain customs which with little modification, constituted for many centuries the criminal law of the country. And from these customs a large portion of our modern law has painfully emerged." True some of the ideas and customs running through the law as it exists today, may be ascribed to Roman origin, yet the larger part is founded on the Teutonic. As to what these customs were, we are able to catch glimpses of them through the latin of Tacitus, other Roman historians and the political and social organization brought by the early Teutonic conquerors to the shores of Britain. In this way we can also trace, without great difficulty, their simple but

* *Pikes History of Crime* vol I. p. 7.

fundamental ideas of justice and right, and what concerns us most, their crude but effective way of dealing out justice. We find that with this people as with all other peoples the idea of justice first had its repository in the minds of the individual, instead of its being formulated in statutes and precedents; and that the application of that idea to circumstances calling for remedial action, came through the personal activity of each man. Then it was, that force was law itself and not behind the law as we now speak of it. "Eye for eye", "tooth for tooth", "life for life" were as much maxims to be followed with those wild tribes as "equity is equality" or that "equity presumes that to be done which ought to be done" with us today. But a little later, when justice began to be tempered with mercy, we find the extreme rigor of this rough code somewhat modified. The "blood wite", or compensation in the form of property for personal wrongs, began to take the place of private revenge. Public opinion declared that every outrage committed was committed by all in blood relation to the wrongdoer, and as a consequence, they were held as a body,

responsible before the Moot or town meeting. This meeting was the common ground on which all the freeman met for the combined purposes of police and government. Here legislation and justice joined hands, and were represented by the same functionaries. Here, indeed, do we find judicial legislation in its simplicity.

Coming down to later times we find these customs crystalized in the form of precedents and statutes, and the rude Moot or "tun" meeting for the purposes of which it in early times existed, subdivided into the Executive, Legislative and Judiciary. At this **time** it is, that judicial legislation for the first could make itself distinctly felt. The Judiciary, then as now, had the power to formulate rules by which evidence was admitted or excluded; regarding the manner in which trials should be conducted; and therefore, could in large part control the fate of those tried by it. In England during the Middle Ages and down into the Seventeenth Century the judiciary seemed wholly devoid of human sympathy and therefore, what legislative power it possessed, was thrown in the wrong direction and no accused received fair and

impartial treatment. This could hardly be otherwise. The atmosphere surrounding the courts could produce nothing else. Shocking deeds of brutality had been practiced continuously for centuries before the judges by way of torture, to obtain confessions from witnesses and accused alike. They were also accustomed to sit at trials by ordeal, compurgations and at judicial duels. Hardened as they were to human suffering, the practice of the judges to gloat over the misfortunes of the accused, to inflict as much pain as possible before judgment pronounced and to bawl out abusive epithets with blood-thirsty exultation, became a characteristic of the judges in the criminal courts. Macauley's description of Judge Jeffreys will give a good idea of the character of a criminal court judge of that period. "Impudence and ferocity" says Macauley, "sat upon his brow. The glare of his eyes had a fascination for the unhappy victim on whom they were fixed; yet his brow and eye were said to be less terrible than the savage lines of his mouth. His yell of fury, as was said by one who had often heard it, sounded like the thunder of the judgment day. These

qualifications he carried while still a young man from the bar to the bench. Already might be remarked in him the most odious vice which is incident to human nature, a delight in misery merely as misery. There was a fiendish exultation in the way in which he pronounced sentence on offenders. Their weeping and imploring seemed to titillate him voluptuously; and he loved to scare them into fits by dilating with luxurious amplification on all the details of what they were to suffer."

Jeffrey was but one of his class, and judicial legislation in the keeping of such custodians massed itself in those times on the side of avarice and cruelty. This is illustrated by reference to the famous Throckmorton treason trial which occurred in the reign of Mary. In this trial by the rules established by the court itself the prisoner was not to be allowed counsel, but was obliged to rely entirely upon his own wit and tongue. Every expression used by him was turned by the judges to his own disadvantage, if possible, and in every good argument put forward by him he was interrupted and sometimes silenced. When he raised a

point of law and asked the court to refer to certain statutes for authority for his statement, he was told that no books would be brought at his desire, and that the judges knew the law well enough without such aid. When he criticised precedents quoted by the Attorney General against him, it was complained that he was allowed to talk too much, and the Bench threatened in a vague way, certain consequences were he to continue. The judges in this trial even hinting to the jury before their retiring, that there was sufficient evidence to convict. This is the first trial of which a complete report has been preserved, and it illustrates in a forcible way the tendency of judicial legislation at that time in the criminal law.

After the latter part of the Seventeenth Century it appears that in England judicial legislation, enforced largely by a Christianized public opinion, had driven torture almost entirely from the courts. "Peine forte et dure" was the only practice left and that was practiced only at rare intervals. From this time inhuman punishments grow less and less frequent and the

tone of the courts in inflicting punishment is more and more human. On the continent the courts it seems, passed through the same cycle of experience. Lieber in his book on Free Government p.218, says in speaking of self-development of the law through the courts: " In countries in which this important principle is not acknowledged, certain changes produced by "practice" were and are nevertheless winked at, and happily so, because legislation has neglected to make the necessary changes, and humanity will not be outraged. Thus, in German countries, practice (judicial legislation) had abolished the torture and fearful punishments demanded by positive law long before they were abolished by law." This change to better things, of course, came about slowly, as does any great and radical change in any department of the law. And the result was, that accused persons were given fair and impartial trials before their peers, the strong arm of the legislative power which the courts possessed was thrown about them by way of rules of evidence, mode of trial, ~~and~~ discretion as to punishments and rules of construction; and a protecting bulwark

of presumptions was constructed, all to bear on the side of humanity and justice. Back in the latter part of the Sixteenth Century we first find the tendencies drifting strongly in the right direction. Stephens, in his History of Crime in England Vol I, p. 468, remarks: "If the average number of executions in each county were only twenty or a little more than one fourth of the actual number of capital sentences in Devonshire in 1598, this would make eight hundred executions per year in the forty English counties." Coke remarks as follows in the concluding lines of his Third Institute on the above situation: "What a lamentable case it is, to see so many Christian men and women strangled on that cursed tree of the gallows, insomuch as if in a large field a man might see together all the Christians that, but one year throughout England come to that untimely and ignominious death, if there were any spark of grace or charity in him, it would make his heart to bleed for pity and compassion."

THE END.

